

SOUTH AFRICA / JUDGMENT

Miele ET CIE GmbH & Co v Euro Electrical (Pty) Ltd. (1/88) [1988] ZASCA 1; [1988] 2 All SA 244 (A) (1 November 1987)

[1988] ZASCA 1

COURT

Supreme Court of Appeal

BEFORE

Corbett, Botha, Smalberger, Vivibr, Nicholas

CASE / FILE NUMBER

1/88

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

MIELE ET CIE GmbH & COappellantandEURO ELECTRICAL
(PROPRIETARY)LJMITEDrespondent.
MIELE ET CIE GmbH & CO
EURO ELECTRICAL (PROPRIETARY)
LJMITED
CORAM: CORBETT,
BOTHAS, SMALBERGER, VIVIBR JJA,etNICHOLAS AJA.
DATE OF HEARING: 9 November 1987
DATE OF HEARING

DATE OF JUDGMENT:

DATE OF JUDGMENT

JUDGMENT

CORBETTJA: The appellant in this matter is Miele et CieGmbH 6 Co ("Miele"), a company incorporated under the laws of the Federal Republic of Germany and having its

CORBETT

/ registered

registered office in Westphalia, West Germany. Miele carries on an old-established business for the manufacture and supply of, mainly, domestic electrical appliances, such as washing-machines, stoves, ovens, vacuum-cleaners, dishwashers and the like. Miele has always produced goods of the highest quality and its domestic appliances are amongst the most expensive of their type on the market. It operates and markets its goods in many countries of the world and some idea of the size of its business may be gained from the fact that in

the 1983 financial year its audited financial statements revealed a turnover in excess of 1,7 billion German marks (which at the time amounted to some R690 million). Its

goods are sold under the trade mark "Miele". Miele also manufactures and supplies spare parts for its products. Indeed, the supply of spare parts and after-sale service is emphasized by Miele to ensure that each/ product

product, which is designed to last for many years, will easily be maintained and speedily serviced when neces-

In 1972 Miele registered the name "Miele" as a trade mark in South Africa, in terms of the Trade Marks Act 62 of 1963, in four different classes, covering a wide range of domestic and other electrical appliances. And in 1978 there followed four more registrations, covering mainly the same classes, of the word "Miele" written in a special script and in accordance with certain precise dimensions (known as Miele's "international script form").

Prior to 1979 Miele traded in South Africa on a very limited scale. In that year, however, respondent, Euro Electrical (Proprietary) Ltd ("Euro Electrical") — a company which carries on a retail business in domestic electrical appliances from a shop at U39A, Eastgate

/ Shopping

Shopping Centre, Bedfordview, Johannesburg — as a result of approaches made by its managing director, Mr L Paletz, was granted the right to distribute Miele's domestic appliances in South Africa. This agency, or distributorship, agreement was entered into orally and never reduced to writing. In terms of it Euro Electrical was authorized to import, sell, service and repair Miele products and this included the right to service and repair Miele goods which had been sold to the public by third parties. Furthermore, Euro Electrical was authorized to

use the word "Miele", in its international script form,

in the name of its business and repair service.

The agreement was duly implemented. Sales

of Miele's goods in South Africa increased rapidly.

Indeed, over the period 1979 to 1982 Euro Electrical purchased from Miele goods and spare parts to the value of some R752 800,00. And Euro Electrical used the

/ names

names "Miele" and "Miele Appliances" as a trading style,
in a manner which I shall describe in more detail later.

Euro Electrical also sold domestic appliances made by other manufacturers, but the bulk of its turnover was in Miele's goods.

On 5 August 1982 this agreement was cancelled

by Euro Electrical, in terms of a letter written by its attorney on its behalf. The ground of cancellation was stated to be Miele's persistent refusal to carry out the terms of the agreement. Evidently Miele decided to, and did, establish its own subsidiary in South Africa, Miele (Pty) Limited, to act as the sole wholesale distributor of its products in South Africa; and Euro Electrical was told that it had to obtain goods and spares from the South African subsidiary. This was alleged by

Euro Electrical to be in contravention of its agreement with Miele, which it described as an "exclusive distributorship",

and which was to endure until 1989. The details and merits of this dispute about the agreement are not, however, relevant in this case: all that is relevant is the fact that the agreement was cancelled on 5 August 1982. Thereafter attempts were made to settle the dispute, particularly in view of a possible change in the shareholding in

Euro Electrical, but these attempts came to naught.

In a letter dated 26 August 1983 written to Euro

Electrical by Miele's attorneys it was pointed out that as a result of the cancellation of the distributorship agreement Euro Electrical's right to use the names "Miele" or "Miele Appliances" as a trading style had fallen away and

that continued use thereof would constitute an infringement

of Miele's registered trade marks. The letter concluded

with a demand that such user cease and a threat of legal

proceedings in the event of the demand not being acceded

to. To this letter Euro Electrical's attorneys replied on 16 September 1983, the final paragraph of the reply reading:

"As Miele in Germany refuses to supply any further goods to our client, our client had no alternative but to accept repudiation and sue for damages, but he has never waived his right to use the name Miele Appliances and it is therefore not prepared to cease using this name".

Euro Electrical continued to carry on trading as before

and in March 1984 Miele applied to the Transvaal Provin-

cial Division on notice of motion for an order interdicting Euro Electrical, its agents and servants from infringing Miele's registered trade marks, in terms of sec 44(1):

(b) of the Trade Marks Act 62 of 1963 ("the Act"), by using the trade name "Miele Appliances" as the trade name of its shop at the Eastgate Shopping Centre or at such other places as Euro Electrical may trade under that name. A further prayer in the notice of motion for an interdict against an alleged infringement of sec / 44(1)(a)844(1) (a) of the Act was dropped in the Court aquoand need not be referred to.

The application came before Strydom AJ (as he then was), who dismissed the application with costs, including the costs of two counsel. With leave of the Court aquoMiele now appeals to this Court against the whole of the judgment and order of the Court aquo.

The relevant portion of sec 44(1) of the Act reads as follows:

"(1) the rights acquired by registration of a trade mark shall be infringed by —

(b) unauthorized use in the course of trade, otherwise than as a trademark, of a mark so nearly resembling it as to be likely to deceive or cause confusion, if such use is in relation to or in connection with goods or services for which the trademark is registered and is likely to cause injury or prejudice to the proprietor of the trade mark: "

Although

Although the subsection speaks only of a mark so nearly resembling it (ie the registered trade mark) as to be

likely to deceive or cause confusion, it is clear that

the subsection includes the use of the identical mark

(see *Protective Mining & Industrial Equipment Systems*

Protective Mining & Industrial Equipment Systems

(Pty) Ltd (Formerly Hampo Systems (Pty) Ltd) v Audiolens

(Cape) (Pty) Ltd 1987 (2) SA 961(A), at p 987 C-F).

(Cape) (Pty) Ltd

1987 (2) SA 961

This is such a case; and accordingly I shall refer only

to the use of the registered mark. A proprietor who

claims infringement of his trade mark in terms of sec 44(1)(b) in a case such as this must, therefore, establish

the following:

(1) that there has been use of the trade mark by

the alleged infringer;

(2) that such use was unauthorized;

(3) that such use was in the course of trade;

(4) that such use was otherwise than as a trade mark;/ (5)

(5) that such use was in relation to or in connection with goods or services for which the trade mark is registered; and

(6) that such use is likely to cause injury or prejudice to the proprietor of the trade mark.

I shall consider each of these requirements in turn.

(1) Use of the trade mark

Use of the trade mark

The evidence in regard to Euro Electrical's use of the trade mark "Miele", both before and after the cancellation of the distributorship agreement, is not altogether clear and in some respects there are disputes of fact. Since Miele seeks a final interdict without resort to viva voce evidence the Court must adopt the approach outlined in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623(A), at pp 634 E - 635 C, in regard to disputes of fact.

viva voce

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51

1984 (3) SA 623

/ Adopting

Adopting this approach, I find the factual position to be as follows.

In terms of the distributorship agreement

Euro Electrical was granted the right to use the trademark "Miele" in the name of its business and repair service. One of the ways in which Euro Electrical made use of this right was to display the word "Miele" (in its international script form) on its shop front at the premises in Eastgate Shopping Centre. This use continued after the cancellation of the agreement and it would seem up to the time when legal proceedings commenced. Photographs (annexure "D" to the founding affidavit) were placed before the Court depicting Euro Electrical's shop from various angles. From these photographs it would appear that the shop is housed in the

internal part of a modern-style shopping centre. The

shop frontage consists of four facets, set at right-

/ angles

angles to one another, which present a sawtooth-like facade to the floor-space used by passing shoppers. Each facet consists of a large metal rectangular frame reaching from floor to ceiling. The lower (approximately) two-thirds of each facet is filled by a rectangular glass front, which acts as a window for goods displayed inside the shop, advertisements, etc. The upper (approximately) one-third of each facet is occupied by a sign (we were

told from the Bar that it is a neon sign), consisting

of a white background upon which there appears in blue

and in large characters the word "Miele", in its inter-

national script form. Judging from the photographs,

the dimensions of each of these signs, which are rectangular

in shape, would appear to be about one metre high

and about two metres wide. It is not clear from the photographs where the entrance to the shop is, but it would seem that one of the display windows consists of a sliding glass panel, which when opened would give

/ access

access to the shop. The overall impression to be gained from the photographs is that the "Miele" neon signs are very striking and prominent. The photographs also reveal goods on display inside the shop, as also advertising placards, mainly relating to Miele products. There is, however, a fairly prominent sign, probably also a neon sign, inside the shop, consisting of the name "Liebherr", which is evidently a make of refrigerator stocked by Euro Electrical. It further appears from the opposing affidavit deposed to by Paletz that these "Miele" neon signs were erected in 1979 with Miele's knowledge and approval and that the Miele advertising placards were supplied to Euro Electrical by Miele.

In regard to the situation as revealed by the photographs, Paletz, in his opposing affidavit, stated the following:

/ "6.1 The

"6.1 The Miele signs over the shop front

depicted in Annexure 'D' were erected in 1979 with the applicant's knowledge and approval. The placards advertising the Miele appliances which can also be seen in Annexure 'D' in the shop window, were supplied to me by the applicant.

6.2 At the time when these signs were erected, the respondent also sold other kitchen appliances not made by the applicant such as 'Liebherr' refrigerators. As the bulk of the respondent's turn-over was in the applicant's goods, the Miele sign was given prominence over the shop front.

6.3 These advertising signs were and are used

(a) to identify the Miele goods sold by the respondent; and (b) as a name to identify the re-tail and repair services provided by the respondent.

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to identify the Miele goods sold by the respondent; and

(b) as a name to identify the re-tail and repair services provided by the respondent.

as a name to identify the re-tail and repair services provided by the respondent.

6.4 The respondent still has in stock substantial quantities of Miele goods supplied to it by the applicant which as the applicant concedes it is entitled to market under the name Miele".

/ On '

On the strength of this and possibly encouraged by certain questions put to Mr Ashton, who appeared on behalf of Miele, by a member of this Court, counsel for Euro Electrical, Mr Goodman, submitted that it had not been established that Euro Electrical's use of the name "Miele" on its shop front amounted to anything more than an advertisement of the fact that the business dealt in goods produced by Miele. And it was conceded by Mr Ashton that Euro Electrical was fully entitled to advertise the fact that it sold goods which constituted

Ashton

Goodman

genuine Miele appliances. (Cf Protective Mining case,

Protective Mining

supra, at p 992 B.)

Mr Goodman's submission runs counter to what

had been stated in the heads of argument filed on behalf of Euro Electrical and, in any event, it is, in my view, unsound. The test, it seems to me, is how the ordinary

reasonable member of the purchasing public would regard

and interpret Euro Electrical's use of the name "Miele" on its shop front: whether as the trading style or name of the business or whether as an advertisement that Miele goods were on sale in the shop. (Cf. *Berman Brothers (Pty) Ltd v Sodastream Ltd and Another* 1986 (3) SA 209(A), at p 233 H). Having regard to the size, permanence, position and number of the neon signs and the general impression conveyed by them, as portrayed by the photographs (annexure "D"), I am of the opinion that the ordinary reasonable member of the purchasing public would regard them as

Berman Brothers (Pty) Ltd v Sodastream Ltd and Another

1986 (3) SA 209

conveying the name of the shop or the business conducted

in the shop; and not merely as advertisements. The

placards, on the other hand, would be regarded as adver-

tising material; as also the "Liebherr" sign.

Also in the papers before the Court is a copy of an advertisement which appeared in the *Star* newspaper on 15 May 1981. It advertises Miele appliances and

at the foot of the advertisement the following information is given —

—

"Miele Appliances U39A Eastgate Shopping Centre

Bedfordview 2008

Tel 615-7372".

The advertisement was inserted by Euro Electrical with Miele's knowledge and approval. It thus appears that

Euro Electrical also used the name "Miele Appliances"

for the business conducted by it at the shop. The advertisement was, of course, placed while the distributorship

agreement was still in operation and there is very little direct evidence, apart from general allegations, to show that this name was used after the agreement had been

cancelled. There is, however, the statement in the

letter of 16 September 1983, quoted above, which seems

to amount to a clear admission that after the cancellation of the agreement Euro Electrical used the name "Miele Appliances" and to a statement that it intends to continue doing so in the future.

This letter was attached to the founding affidavit deposed to by Miele's export manager, Mr G Becker. In his opposing affidavit, when dealing with the paragraph in the founding affidavit in which this letter is referred to, Paletz did not suggest that Euro Electrical did not carry out the threat to continue using the name "Miele Appliances". Furthermore, in Miele's replying affidavit, which was deposed to by Mr R Buchner, the general manager of Miele (Proprietary)limited, the allegation is made that Euro Electrical's vehicles made no reference to its company name and simply bear the name "Miele" and Euro Electrical's shop address; and photographs of such a vehicle are attached. The photographs themselves show a light delivery vehicle open at the back (popularly known as a "bakkie"), with large "Miele" signs, in the international script form, painted on the rear and sides of the loading portion

of :

of the vehicle; and with the following painted on one

of the doors of the cab:

"Miele Appliances39 A Eastgate

Tel 615 7372".

Admittedly, this evidence was adduced only in reply, but Euro Electrical did not object thereto or seek to controvert it.

The evidence would thus seem to establish that

at the time when the application was made Euro Electrical was using the name "Miele", either alone or in the combination "Miele Appliances", as a trading style. Much of this use is of the name written in its international script form. According to sec 2(2) of the Act references in the Act to the "use of a mark" —

"... shall be construed as references to the use of a printed or other visual representation of the mark, and, in the case of a mark which is capable of being audibly reproduced, the use of an audible reproduction of the mark".

In my view, there is no doubt that the evidence which I have recounted establishes that at the time of the institution of proceedings Euro Electrical was using Miele's trade mark, in both its forms of registration, and appeared to have every intention of continuing to do so.

In his opposing affidavit Paletz stated that sales and repairs of Miele products had been effected through the name of Euro Electrical and not Miele and he annexed a specimen invoice and a specimen letterhead to prove this. This evidence is of no real assistance to Euro Electrical for if, as I have found, it has used the trade mark in certain respects to denote the name of the business, it is no answer to say that in certain other respects, when referring to the business, it did not use the trade mark.

/ (2)Unauthorized

Unauthorized

(2)Unauthorized useThe use of Miele's trade mark was originally authorized in terms of the distributorship agreement, but such authorization fell away with the cancellation of that agreement. About this there is no dispute; and any doubt that there might have been on this score, on the part of Euro Electrical, would have been removed by the letter of 26 August 1983, which is referred to above.

Unauthorized use

(3)Use in the course of tradeEuro Electrical unquestionably carries on a trade. Its use of Miele's trade mark in its trade name clearly amounts to use thereof in the course of trade. Euro Electrical did not dispute this.

Use in the course of trade

/ (4)Use otherwise

Use otherwise

(4)Use otherwise than as a trade markand

Use otherwise than as a trade mark

(5)Use in relation to or in connection

Use in relation to or in connection

with goods or services for which the trade mark is registered.

with goods or services for which the

trade mark is registered

In view of certain arguments advanced on behalf

of Euro Electrical, it is convenient to deal with these requirements together.

The requirement, under (4) above, that the use be "otherwise than as a trade mark" distinguishes infringement of a trade mark in terms of sec 44(1) (b) from that falling under sec 44(1)(a), which requires use of the mark "as a trade mark". The origin of sec 44(1)(b) and its *raison d'être* were described in the *Protective Mining* case, *supra*, at pp 986 E - 987 B. Use of a mark "as a trade mark"

and use of a mark "other-wise than as a trade mark" constitute converse situations and any enquiry as to which (if either) of these situations obtains must generally commence with an investigation as to whether the mark has been used as a trade mark.

raison d'être

In terms of the definition of "trade mark" in sec 2 of the Act use of a mark, in relation to goods or services, "as a trade mark" means use for the purposes of indicating a connection in the course of trade between the goods or services and the proprietor of the mark (because of non-relevance I leave out of account the regis-tered user) and of distinguishing those goods and services from the same kind of goods and services connected in the course of trade with other persons.

(See Berman Brothers case, supra, at p 236 F; Protective Mining case, supra, at pp 987 G - 988 B.) Use of a mark

Berman Brothers

"otherwise than as a trade mark" refers to user where

these purposes are not present, but where the mark is used for other purposes such as, for example, in order to compare the user's goods or services with those of the proprietor of the mark (Protective Mining case, supra, at p 986 F) or to indicate that the goods or services

supra,

may be utilised in substitution for those of the proprietor of the mark (see Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1(A), at pp 41 J - 42 C).

Klep Valves (Pty) Ltd v Saunders Valve Co Ltd

1987 (2) SA 1

Sec 44(1)(b) requires the user to be "in relation to or in connection with goods or services for which the trade mark is registered". Thus user in relation to or in connection with goods not covered by the trademark registration or in relation to services where the registration is for goods, or vice versa, falls outside the ambit of the sub-section.

vice versa

It is Miele's case that the purpose of Euro Electrical's use of its (Miele's) trade mark as a trade name is to indicate an association of some kind between Euro Electrical's business and that of Miele, either that the business is that of Miele itself or that it is a local branch or agency of Miele; that this constitutes user in relation to or in connection with goods

in respect of which the trade mark is registered; and that this user is use otherwise than as a trade mark.

Euro Electrical concedes (in counsel's heads of argument, at any rate) that its use of Miele's trade mark is to signify a connection in the course of trade

between the business of Euro Electrical and that of Miele,

but contends that this user is in relation to services and not goods, and that, in any event, even if it does relate to goods, it is use "as a trade mark" in terms of sec 44(1)(a). The first of these contentions, if borne

out by the facts, would provide an answer to Miele's claim,

since its registered trade marks relate only to goods; the

second, if well-founded, would be a defence on the basis

that Miele, so it is argued, specifically abandoned in the

Court acquits cause of action based on sec 44(1)(a).

The first question to be considered is whether

/ Euro

Euro Electrical's use of the trade mark "Miele" is in relation to or in connection with goods or in relation to or in connection with services. During the course of argument Mr Goodman was asked "What services?"; and to this he replied "the services of selling, distributing and repairing Miele's products". Repairing is, of course, a service, but in the context of Euro Electrical's business it is merely ancillary to the main activity of selling goods. And, in my view, it is artificial and incorrect to regard the selling of goods, even if they all emanate from a single manufacturing source, as the provision of services. Euro Electrical uses the mark, as I have said, as its trading style in order to indicate that its business, in which it sells Miele products, is associated with Miele. If that user is in relation to or in connection with anything, it is, in my view, goods and not services; the goods being the Miele products and/ other

other goods sold by Euro Electrical. The question still remains, however, as to whether this user does fall within the scope of the words "in relation to or in connection with" these goods.

With regard to the phrase "in relation to"

it is provided in sec 2(3)(a) of the Act that —

"References in this Act to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in physical or other relation to, goods".

"In relation to" is a phrase susceptible of a wide meaning

(see *Shalom Investments (Pty) Ltd and Others v Dan River Mills Incorporated* 1971 (1) SA 689(A), at p 704 H). The addition in sec 44(1)(b) of the phrase "in connection with" (cf. sec 44(1)(a) which speaks only of "in relation to") must be interpreted as further widening the link or connection which, according to sec 44(1)(b), should

Shalom Investments (Pty) Ltd and Others v Dan River

Mills Incorporated

1971 (1) SA 689

exist between the use of the mark and the goods.

/ (CfLipschitz NO.

Lipschitz NO.

(Cf.Lipschitz NO v UDC Bank Ltd1979 (1) SA 789(A), at p 797 D-E.) Any attempt on my part to more closely define what these phrases mean would be both difficult and imprudent. It is for the Court to decide, adhocin each case, whether the user in question falls within the ambit of these phrases or not. General guidance may no doubt be derived from the apparent object of sec 44(1)(b) which was to extend the scope of infringement to cases where the infringer's use of the mark, thoughnot use as a trade mark, was in order to prey upon or

Lipschitz NO v UDC Bank Ltd

1979 (1) SA 789

take advantage of the reputation and goodwill of the proprietor of the mark.

In the present case Euro Electrical uses the mark as its trade name (or part thereof). Such user is likely to convey to the purchasing public that there is a trading association between Euro Electrical and the proprietor of the mark, Miele. Euro Electrical

/deals

deals in goods produced by the proprietor of the mark, the classes of goods for which the mark was registered, and that no doubt is the reason why it used the mark as its trade name in the first place and why it wishes to continue to do so. The other goods sold by it which do not derive from Miele would also, it would seem, fall into one or more of the classes for which the mark wasregistered. In my opinion, there is a sufficient link in this case between the use of the mark by Euro Electrical and goods for which the mark is registered for it to be said that the mark is used in relation to or in con-nection with such goods.

Finally, there is the question as to whether in these circumstances the mark is used "as a trade mark" or "otherwise than as a trade mark". In my view, the latter represents the true position. Euro Electrical's use of the mark as a business name is not for the purpose

of indicating a connection in the course of trade between the goods and the proprietor of the mark or of distin-guishing those goods from similar goods emanating from other persons. Those purposes are achieved by the marks applied to the goods themselves. Euro Electrical's use of the mark is for the purpose of indicating an association or connection between its business and that of Miele. My conclusion, therefore, is that requirements (4) and (5) have also been satisfied.

(6) Injury or prejudice It was on the ground that Miele had failed to establish the likelihood of injury or prejudice that the Judge aquonon-suited Miele. MrAshtonsubmitted on appeal that in doing so the learned Judge erred. MrGoodmansupported the learned Judge's decision on this issue.

Injury or prejudice

The enquiry here is whether Euro Electrical's

use of the mark is likely to cause injury or prejudiceto the proprietor of the mark, Miele. This turns verymuch upon the meaning of the words "injury or prejudice"

("skade of nadeel" in the Afrikaans text, which, however,

is not the signed text). It seems to me that in thiscontext "injury", or "skade", refers to the delictualconcept ofdamnum, that is patrimonial or pecuniary loss

damnum

suffered by a person, whereas prejudice is a wider concept which would include an impairment of a person's rights and interests not necessarily resulting in patrimonial or pecuniary loss.

The distinction is well illustrated by the

judgment

of Caney AJP (with whom Henning J concurred)in the case ofWestern Credit Bank Ltd v Kajee1967(4) SA 386(N). In that case the Court was calledupon to consider the meaning to be attached to the/ word

Western Credit Bank Ltd v Kajee

1967(4) SA 386

word "prejudice" in the context of sec 3 of the Cónventional Penalties Act 15 of 1962, which empowers the court to reduce a conventional penalty where it appears to be out of proportion to the "prejudice" suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated. In

terms of the section the court is directed in determining the extent of the prejudice to take into consideration—

".... not only the creditor's

proprietary interest, but every

other rightful interest which may be affected by the act or

omission in question".

Having noted (at p 390 H) that the word "prejudice" was used, not loss or damage, Caney AJP had the fol-

lowing to say about the meaning of "prejudice" in the

context of sec 3 (at p 394 D):

"The damages suffered by the plain-

tiff are not the sole criterion, for the operation of sec. 3 of the Act

hinges on prejudice, which is wider

in its connotation than damages.

The full extent of this may be difficult

to ascertain in any particular case, but *Rex v Dhlamini*, 1943 T.P.D. 20 at p 23, followed in *Rex v Williams*, 1943 C.P.D. 206 at p 208, indicates that prejudice includes 'far more than pecuniary loss' and may, according to the circumstances, include impairment of reputation or personal dignity and possibly cover any substantial inconvenience".

Rex v Dhlamini

1943 T.P.D. 20

Rex v Williams

1943 C.P.D. 206

(See also *Van Staden v Central South African Lands and Mines* 1969 (4) SA 349 (W), at p 352, where *Snyman J*

tried So

1969 (4) SA 349

formulated the concept of prejudice in somewhat wider terms; *Burger v Western Credit Bank Ltd* 1970 (4) SA 74 (T), at pp 76 G - 77 A.)

Burger v Western Credit Bank Ltd

1970 (4) SA74

In this case Miele has not established the likelihood of injury ("skade") as a result of the use by Euro Electrical of its trade mark. This is conceded by Mr Ashton. But what of the likelihood of prejudice? It is contended on Miele's behalf that there is prejudice to it in that (i) the use by EuroElectrical of its trade mark conveys to the public

/ that

that Euro Electrical is part of Miele's business, or is a local branch or agency of Miele; (ii) Miele's business reputation and goodwill, therefore, lies to some extent in the hands of Euro Electrical; and (iii) because in fact Euro Electrical is not part of Miele or its local branch or agent, Miele is not able to exercise any control over the way Euro Electrical runs its business or markets Miele's goods or main-tains or repairs such goods.

It seems to me that there is substance in this contention. It is true that Paletz contends that the services provided by Euro Electrical to the public are "far in excess" of those required by Miele and for the purposes of this case it must be accepted that, at any rate, the services are not inferior to what is required. But Euro Electrical is a company and the control of a company may change hands. Its staff, too, may change.

/ Circumstances,

Circumstances, such as financial stringency, may cause a fall in standards. Nothing is static in business. In the circumstances Miele's lack of ability to con-trol how Euro Electrical conducts its business under the Miele trade mark is, in my view, a real source of prejudice. (Cf Capital Estate and General Agencies (Pty) Ltd and Others v HolidayInns Inc and Others 1977 (2) SA 916(A), at pp 931 B - 932 D.)

Capital Estate and General Agencies (Pty) Ltd and Others v Holiday

1977 (2) SA 916

Requisite (6) is accordingly established. It follows from the foregoing that Miele established an infringement of its trade mark under sec 44(1)(b) of the Act and that in dismissing the application the Court a quo erred.

The appeal is allowed with costs and the order

of the Court aquois altered to read:

"(1) The respondent, its agents and servants are interdicted and restrained from infringing the applicant's registered trade marks Nos B72/3689, B72/3690, B72/3691, B72/3692 B78/3272, B78/3273, B78/3274 and B78/3275 in terms of section 44(1)(b) of the Trade Marks Act No 62 of 1963, by using the names "Miele Appliances" or "Miele" as the trade name of its shop situated at Shop U39A, Upper Level, Eastgate Shopping Cent're, Bedfordview, Transvaal, or at! such other places as the respondent may trade under that name.

(2) The respondent is ordered to pay the costs of the application including the costs of two counsel".

M M CORBETT BOTHA JA)

NICHOLAS AJA)

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Prepared on 12 October 2026 · Esheria